Congress required incumbents to provide new entrants with unbundled networks because "[d]uplicating [ILEC] facilities would be prohibitively expensive...and in most areas there is no readily available technological substitute for bridging the last mile between end users and national telecommunications networks." FCC DSL Br. at 22 (citing *UNE Remand Order* ¶¶ 181-95). Although AT&T and other cable companies have begun to deploy alternative facilities-based local telephone services, those offerings are not widely available today.

In these circumstances, continued regulation of access to the incumbent LECs' facilities is clearly necessary. Consumers are increasingly demanding voice and high speed data services over a single line. Incumbent LECs are already satisfying that demand today and have made clear they consider the ability to offer voice and data services over a single line a significant competitive advantage.[229] If competitors lacked the ability to offer both voice and data services

---

Interactive Week (Oct. 1, 2000) ("Several [securities analysts] noted that some competitive local exchange carriers were not meeting revenue projections, some had gone bankrupt and that the capital markets, especially junk bonds, were closed to new carriers."); *Darwin Claims Another CLEC*, Communications Today (Oct. 4, 2000) ("Nettel is just the latest telecom casualty in the dog-eat-dog CLEC arena."); Janet Whitman, *McLeodUSA's CapRock Buy May Mark New Consolidation Round*, Dow Jones News Service (Oct. 3, 2000) ("Troubled CLECs that don't manage to secure additional funding" are "likely to face bankruptcy" unless they can find a buyer).

[229] *SBC Launches $6 Billion Broadband Initiative to Transform It Into America's Largest Single Broadband Provider*, Business Wire (Oct. 18, 1999) (quoting SBC CEO Ed Whitacre as stating that "[b]y converting the 'last mile' into a high-speed 'first mile' on-ramp to the Internet, [SBC is] making nearly all of [its] approximately 60 million access lines more powerful for customers and more valuable to shareholders...Project Pronto [*i.e.*, SBC's DSL service], together with [its] expanding service footprint and plans to provide long-distance service, is an integral part of our plan to be a full-service, global provider and the only communications company our customers need") ; Dick Kelsey, *Qwest 3Q Profit Up 18 Percent*, Newsbytes (Oct. 24, 2000) (reporting Qwest's CEO Joseph Nacchio has stating that Qwest intends to push "bundled" voice/data services to its customers); *Verizon Posts Strong Third Quarter Revenue Growth on Sustained Demand for High-Growth Services* (Oct. 30, 2000) <http://investor.verizon.com/news/VZ/2000-10-30_X294729.html> (quoting Verizon President and co-CEO Ivan Seidenberg as stating that "'With the premier set of local wireline and wireless assets in the industry, we have the right platform – a fiber-rich, data-centric network architecture – on which to build a truly integrated bundle of broadband communications services that will create value for customers and shareholders'"); Duane Ackerman, *Take Another Look at BellSouth* (Oct. 4, 2000) (http://www.bellsouth.com/investor/100500goldmansachs.doc) ("we have last-mile connectivity

over a single loop, they would be at a severe competitive advantage in the vast majority of the nation where there is no other facility over which both services can be provisioned. Continued regulation is therefore necessary to prevent incumbent LECs from further entrenching their voice monopolies. *See* Ordover and Willig Decl. ¶ 43.

Retention of existing access regulation is also necessary to prevent incumbent LECs from leveraging their bottleneck monopolies into nascent advanced services "offered over the same bottleneck facilities."[230] For example, a dominant local carrier might harm competition for a non-monopoly DSL service by implicitly pricing it at a non-compensatory level when it is sold as a part of a voice bundle. Ordover and Willig Decl. ¶ 44. This strategy entails setting the unbundled price of the basic local service and the price of the combined bundle of services close enough to each other so that the differential is less than the incremental cost of supplying the DSL service alone. *Id.* In this scenario, the direct effect of the conduct is to squeeze out the competing suppliers of the enhanced service that might otherwise serve as attractive complements to the basic services offered by the incumbent LEC. *Id.*

Allowing incumbent LECs to bundle basic services with enhanced services privded over bottleneck facilities could also better enable them to squeeze out efficient potential competitors through non-price means – *e.g.*, by offering lower quality monopoly bottleneck services to customers of their competitors, and by providing quicker or more complete disclosure of their

---

to our customers. In case you haven't noticed, this is a scarce asset, ... [w]e have the most robust local network in the U.S., if not the world. Through prudent and consistent levels of investment, we are leveraging this asset by systematically transforming the network to digital broadband and IP.").

[230] ILECs clearly have a strong incentive to engage in such leveraging. The motive exists because federal and state regulations are designed to prevent them from fully exploiting pricing power over monopoly bottleneck local services. Bundling enables the carrier to exercise this unexploited pricing power in otherwise-competitive markets for complementary goods or services.

network interface specifications and protocols to favored vendors. *Id.* ¶ 45. That is so because bundling potentially "covers up" discrimination. *Id.*

Finally, ~~if~~ the incumbents were exempt from regulation merely because they are using their bottleneck facilities to provide advanced services, they could simply migrate captive local telephony customers to DSL before cable telephony or any other alternative to these monopoly services is available. Then the LECs could exploit their telephony monopoly over local customers without regulation, by means of pricing of local services to end-users as well as pricing of access to long distance providers, all under the rubric of "advanced services" offerings. *Id.* ¶ 46.

No comparable competitive concerns exist with regard to cable systems because, unlike the ILECs, cable operators do not control bottleneck facilities. Non-cable MVPDs are now firmly established as significant competitors to cable MSOs.[231] Indeed, non-cable MVPDs now serve more than 20 percent of all multichannel video subscribers nationwide and have the capacity to serve nearly all remaining cable customers. *See The Kagan Media Index*, at 8 (July 31, 2000).

DBS in particular is thriving. DBS providers have deployed alternative systems that can serve cable customers throughout the nation, already have 13 million subscribers,[232] and are

---

[231] AT&T (and NCTA) have detailed the extensive competition faced by cable companies for video programming distribution in their recent comments in In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming (CS Docket No. 00132).. In these comments, AT&T summarizes this analysis and incorporates those comments by reference.

[232] According to recent statistics in *The Kagan Media Index*, there are 17 million non-cable subscribers (or 20 percent of the 84.9 million MVPD subscribers), including: 13.4 million DBS subscribers, 1.3 million backyard dish subscribers, 1.5 million SMATV subscribers, and 0.8 million wireless cable subscribers. *See The Kagan Media Index* at 8 (July 31, 2000).

adding 3 million new subscribers a year.[233] They are each far larger than any cable MSO in terms of reach and population of potential subscribers. The DBS subscriber base is growing at a percentage rate that is 20 times as fast as cable (and more than half of new DBS subscribers are former cable customers).[234]

While the two major DBS providers' offerings are ubiquitously available to consumers nationwide, they are not the only alternative distribution networks to cable systems. Cable overbuilders have raised "billions of dollars of equity"[235] and are deploying broadband facilities on a large-scale basis. The potential ability to offer – and receive revenues from – telephone, and high-speed Internet services, as well as traditional cable offerings, appears to be providing new incentives to "overbuild."[236] Video programming will soon be distributed using "fixed wireless" facilities[237] – a technology that appears poised to take off because of its ability to offer

---

[233] *Cable, DBS, Other Video Players Square Off Over Regulations*, Communications Daily (Sep. 12, 2000).

[234] *See* Sixth Annual Report, *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, 15 FCC Rcd. 978, ¶¶ 20, 70 (1999) (comparing cable's 1.8 percent subscriber growth rate to the 39 percent growth rate for DBS); *Pay-TV War Between DBS And Cable Heats Up*, Communications Daily (Aug. 23, 2000) (estimating half of new DBS customers former cable customers).

[235] Donaldson, Lufkin & Jenrette, *Cable Operators: Who Wants To Borrow a Billion?*, Media and Entertainment, at 7 (April 18, 2000)

[236] The, CEO of Digital Access, Inc., a company that intends to compete against the incumbent cable operator in Indianapolis, puts it nicely: "What makes this work, and what didn't make it work five years ago, is that instead of competing for a market share of a $35 average cable bill, you are competing for the opportunity to take $100 to $150 out of the home for voice, video and data." *Comcast Has a Battle on its Hands*, Philadelphia Inquirer, June 11, 2000.

[237] Local Multipoint Distribution Service ("LMDS") can provide residential consumers with data rates of 35 to 58 Mbps downstream. Multi-Point to Multi-Point Distribution Service ("MMDS"), which operates at a lower frequency than LMDS, can transport data at rates up to 10 Mbps. These fixed wireless technologies can support multiple services such as cable TV programming, fast Internet connectivity, and videoconferencing. Capacity for both LMDS and MMDS is scalable and can be expanded incrementally by increasing the number of base stations in each area.

a seamless package of voice, data and video programming.[238] Sprint currently provides wireless broadband services to customers in Tuscon and Phoenix, Arizona and has recently committed to expanding those services to an additional 45 markets across the United States covering 24.8 million households.[239] Industry leader WorldCom is deploying fixed wireless facilities with comparable coverage.[240]

2. "Regulatory Parity" Is Not Appropriate Because Of The Substantial Differential In The Costs Of Imposing Access Regulation On ILECs And Cable Operators.

Even apart from the clear competition differences that foreclose any plea for uniform regulation, there are also important differences in the burdens associated with access regulation. Incumbent LECs and cable operators are not similarly situated. As explained above, because of the unique nature of cable Internet services, inflexible government-mandated access regulation would impose enormous costs on cable operators and result in lower quality of service. Such regulation would not only handicap cable operators relative to their broadband rivals, but would directly harm consumers.

On the other hand, the costs of imposing "open access" on incumbent LEC networks – which grew up under a common carrier regulatory regime – are not competitively significant. The same architecture that an incumbent LEC uses to provide its own line-shared DSL service is capable of providing line sharing to a competitor with minimal modifications. (Third Report and Order and Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 20912, ¶ 67 (1999)). Further, it is straightforward

---

[238] *1999: The Year Broadband Wireless Entranced the Industry*, Wireless Today (Jan. 6, 2000).

[239] *See Broadband to Fon du Lac*, tele.com, Sept. 4, 2000, at 37 (Sprint fixed wireless plans to reach 45 markets and aproximately 30 million households); Steve Young & Bruce Francis, *Sprint Broadband Wireless President*, CNNfn (Interview Transcript), Aug. 22, 2000 (Tim Sutton of Sprint Fixed Wireless Group discusses plans to enter 45 markets passing 30 million households).

to deploy DSL technology that does not interfere with voiceband services. *Id.* Finally, it is notable that incumbent LEC's are required to accommodate line sharing with only a single provider. *Id.* ¶ 71.

Any doubt that existing incumbent LEC access regulations are unduly burdensome is dispelled by the fact that ILEC DSL services are thriving today. SBC is expected to become America's largest single broadband provider within the next three years.[241] Likewise, Verizon subscribers have ballooned from 30,000 subscribers to 250,000 subscribers since the beginning of this year and Qwest has increased its subscribership by 280% since the beginning of this year.[242] In fact, driven by the aggressive ILEC deployment, DSL is now expected to overtake cable Internet services in terms of market share by 2002.[243]

In this regard, the Commission should squarely reject any claim that the existing regulatory scheme has chilled ILEC "innovation." The basic infrastructure used by incumbent LECs to provide high speed services was deployed by incumbent LECs under a regulatory regime that shielded them from competition and guaranteed a return on equity. And the incumbent LECs faced no research and development risk with regard to the use of DSL technology; it was developed by Bell Labs prior to the Bell system divestiture.[244] Moreover, it is

---

[240] *See The Year of the Launch*, Wireless Week (June 5, 2000).

[241] *Id.*

[242] *Cable vs. DSL: Which One Is The Tortoise; Suddenly Phone Companies Look Poised To Take The Lead* (citing a study by Cahners In-Stat of Scottsdale, Ariz.) (<http//www.businessweek.com:/2000/00_39/b3700073.htm?scriptFramed>).

[243] *Id.*

[244] *See, e.g.*, Lee Gomes "Telecommunications (A Special Report): Cable Connection," *Asian Wall Street Journal*, 1996 WL-WSJA 12474757 (Sept. 23, 1996).

well-documented that the ILECs only began to deploy DSL technology when faced with competition from new entrants.[245]

In sum, imposing unnecessary regulation on cable operators or abandoning necessary regulation of incumbent LECs in this context would place cable operators at a significant competitive disadvantage with the incumbent LECs (who already enjoy greater economies of scale). Not only would such action impede the deployment of advanced services in contravention of § 706 of the Communications Act, it would also greatly diminish the ability of cable operators to offer local telephone services and provide consumers with meaningful choice.

V. REGULATION OF INTERACTIVE TV WOULD BE HARMFUL BECAUSE THE BUSINESS IS NASCENT, AND IS UNNECESSARY BECAUSE THE BUSINESS IS SHOWING ALL THE SIGNS OF BROAD COMPETITIVE ENTRY WITH HIGH LEVELS OF INVESTMENT AND INNOVATION.

In the NOI, the Commission seeks comment on "the potential services that may develop that make use of a combination Internet and television broadcast channel platform." [246] In addition, the Commission raises the issue of potential "problems" that may arise by allowing an "affiliated or preferred ISP the ability to combine Internet services to the television broadcast channel."[247] AT&T wishes to make the following points as these questions relate to the issue of interactive TV ("ITV"):

- It is premature to consider regulating ITV because the business is in the very early stages of its development, and many important questions about technology, service, and consumer preference are yet to be resolved.

---

[245] *See Broadband Today* at 27 ("The ILECs' aggressive deployment of DSL can be attributed in large part to the deployment of cable Internet service. Although the ILECs have possessed DSL technology since the 1980s, they did not offer the service, for concern that it would negatively impact their other lines of business."); *First Enhanced Services Report* ¶ 42 & n.132 ("All this investment, especially that by cable television companies and competitive LECs, appears to have spurred incumbent LECs to construct competing facilities.").

[246] *NOI* ¶ 49.

[247] *Id.*

ORAL ARGUMENT SCHEDULED FOR OCTOBER 11, 2000

No. 99-1441

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TELECOMMUNICATIONS RESELLERS ASSOCIATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

BRIEF OF INTERVENOR AT&T CORP.

Mark C. Rosenblum
Roy E. Hoffinger
James H. Bolin, Jr.
295 North Maple Avenue
Basking Ridge, NJ 07920

Peter D. Keisler
Michael J. Hunseder
C. Frederick Beckner III
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006

FINAL BRIEF

Counsel for Intervenor AT&T Corp.

May 23, 2000

GLOSSARY

Act	Communications Act of 1934, as amended by the Telecommunications Act of 1996
1996 Act	Telecommunications Act of 1996
BOC	Bell Operating Company
Commission	Federal Communications Commission
DSL	digital subscriber line
LEC	local exchange carrier
Order	Memorandum Opinion and Order, *Application Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, 14 FCC Rcd. 14712 (1999)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

*Authorities upon which we chiefly rely are marked with asterisks.

ADMINISTRATIVE DECISIONS

SCHOLARLY MATERIALS

ISSUE PRESENTED

This brief addresses only the second issue raised by appellant: whether the Federal Communications Commission ("the Commission") acted arbitrarily, capriciously, and contrary to law in holding that an SBC-Ameritech affiliate that complies with the conditions set forth in the *Order* and (i) is wholly owned and controlled by SBC-Ameritech; (ii) succeeds to SBC-Ameritech's "advanced services" business; (iii) obtains its initial assets, employees, and customers from SBC-Ameritech; (iv) receives ongoing operational, installation, and maintenance services from SBC-Ameritech; and (v) provides advanced services under SBC-Ameritech's brand and through joint marketing with SBC-Ameritech, would presumptively not be a "successor or assign" of SBC-Ameritech.

STATUTES AND REGULATIONS

Relevant statutes are appended to the Joint Brief of Appellant and Supporting Intervenor.

STATEMENT OF THE CASE

This appeal challenges the Commission's holding that an affiliate which is wholly owned and controlled by an incumbent local exchange carrier ("LEC"), which inherits the "advanced services" business of that incumbent LEC – including its assets, brand name, personnel, and customers – and which remains substantially integrated with the incumbent LEC in its operations and marketing is nonetheless presumptively not a "successor or assign" of that incumbent LEC and can therefore be relieved of the statutory obligations to which the incumbent LEC must adhere.

That holding is unlawful. The Commission has consistently and properly rejected claims by incumbent LECs that their "advanced services" are not subject to the same statutory obligations as their other services. It has repeatedly found that those claims both are foreclosed by the terms of the Communications Act of 1934 ("the Act") and would frustrate the Act's

central objective to open local telecommunications market to competition. In the *Order* under review, however, the Commission effectively reversed course. While claiming to impose on the merging parties additional obligations, beyond those set forth in the Act, in order to transform a merger of monopolies that it found would otherwise be anticompetitive into one that would serve the "public interest," the FCC instead perversely purported to *free* these incumbent LECs from their statutory, market-opening obligations concerning advanced services so long as they established an "advanced services affiliate" that complies with certain minimal separation requirements devised by the FCC.

In order to place these issues in their proper context, it is helpful briefly to review (1) the Act's regulatory scheme, which the Commission has correctly held applies to "traditional" and "advanced" services in equal measure, and (2) the *Order* on review and the proceedings that led to it.

1. *Section 251(c) of the Act and the incumbent LECs' previously unsuccessful efforts to exempt advanced services from its requirements.* The fundamental objective of the Act is to open the historically closed, monopoly local telecommunications markets to competition. Section 251(c) of the Act is central to this "pro-competitive, deregulatory national policy" for local telecommunications competition. Joint Explanatory Statement, H.R. Conf. Rep. No. 104-458 (1996), at 1. While section 251 imposes duties on telecommunications carriers in general, section 251(c) imposes specific obligations on "incumbent local exchange carriers." "[S]ection 251[c] requires all incumbent LECs to provide nondiscriminatory access to their network facilities, thereby allowing competing carriers to enter local markets by purchasing parts of the incumbent's network, and to allow resale of their services at wholesale rates." *Order* ¶ 452 (JA 290). Congress determined that such access to incumbent networks and services was essential to

permit "efficient entry into the monopolized local market." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499, ¶ 11 (1996).

At least since early 1998, incumbent LECs have repeatedly argued that their "advanced services" (such as high speed Internet access),[1] and the network facilities used to provide them, are not or should not be subject to the requirements of Section 251(c). In particular, they have claimed that when an incumbent LEC provides advanced services it is not "acting as a LEC" and is therefore not subject to the obligations of Section 251(c). *See* Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, ¶ 8 (1999) ("*Section 706 Remand Order*"). Alternatively, they have claimed that the Commission can and should "forbear" from applying the statutory obligations of Section 251 to them insofar as they provide advanced services. *See* Memorandum Op. and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24011, ¶ 68 (1998) ("*Section 706 Order*"). In making the latter claim, they have relied on Section 706(a) of the Telecommunications Act of 1996 ("1996 Act"), which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced services capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearances, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." *See* 47 U.S.C. § 157 note.

---

[1] "Advanced Services" are defined for purposes of the *Order* as "intrastate wireline telecommunications services . . . that rely on packetized technology and have the capability of supporting transmissions speeds of at least 56 kilobits per second in both directions." *Order*, App. C, ¶ 2 (JA 364).

The Commission has rejected each of these claims as foreclosed by the Act. It has squarely held "that the facilities and equipment used by incumbent LECs to provide advanced services are network elements and subject to the obligations in section 251(c)(3)." *Section 706 Order* ¶ 11. It has further held that "advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation." Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 19237, ¶ 3 (1999). In this regard, the Commission has emphasized that the Act is "technology neutral" and that excepting advanced services from section 251(c) would be inconsistent with "Congress' aim to encourage competition in all telecommunications markets." *Section 706 Remand Order* ¶ 12.

The Commission further has rejected the incumbent LECs' claims that Section 706(a) of the 1996 Act grants it authority to waive the requirements of Section 251(c) as applied to advanced services. As the Commission has explained, Section 706 does not grant it "independent authority" to forbear from applying statutory requirements, but instead merely "directs the Commission to use the authority granted in other provisions, including the forbearance authority under Section 10(a), to encourage the deployment of advanced services." *Section 706 Order* ¶¶ 75, 69. The forbearance authority of Section 10(a), however, is sharply limited by Section 10(d), which "expressly forbids the Commission from forbearing from the requirements of Section 251(c) and 271 'until it determines that those requirements have been fully implemented.'" *Id.* ¶ 72 (quoting 47 U.S.C. § 160(d)).

2. *The Order on review.* In the *Order* on review, the Commission approved a merger of two of the largest incumbent LECs in the United States – SBC and Ameritech. The Commission did so despite expressly finding that the merger itself was anticompetitive because it would "(a)

deny[] [consumers] the benefits of future probable competition between the merging firms; (b) undermin[e] the ability of regulators and competitors to implement the pro-competitive, deregulatory framework for local telecommunications that was adopted by Congress in the Telecommunications Act of 1996; and (c) increas[e] the merged entity's incentives and ability to raise entry barriers to, and otherwise discriminate against, entrants into the local markets of [SBC-Ameritech]." *Order* ¶ 3 (JA 109). Nonetheless, the Commission found that overall the transaction was in the "public interest" on the basis of merger conditions proposed by SBC and Ameritech which, it concluded, would provide pro-competitive benefits that would outweigh the merger's anticompetitive effects. *Id.* ¶ 4 (JA 110).

One such condition is at issue in this appeal – the condition that the combined SBC-Ameritech offer advanced services, which they had previously been providing directly, instead through a "separate Advanced Services affiliate." *See id.*, App. C, ¶¶ 1-13 (JA 364-385). These services are provided over SBC-Ameritech's ubiquitous local telephone network using specialized equipment that is "collocated" and used in conjunction with SBC-Ameritech's traditional network facilities, particularly the copper wire "loops" that connect customers' premises to local switching offices. At the time of the merger, both SBC and Ameritech provided such advanced services through the same corporate subsidiaries that also provided traditional local telephone services, and, as noted above, the network facilities used and services provided by these subsidiaries, including those related to advanced services, were subject to all the market opening conditions imposed by section 251(c).

The Commission believed that establishing a separate affiliate would make it more likely that unaffiliated competitors would obtain nondiscriminatory access to those facilities and services that would remain with the incumbent LEC, because the affiliate would have to enter

into agreements with the incumbent LEC to obtain those facilities and services, and unaffiliated competitors could then enter into similar agreements. *Order* ¶ 363 (JA 252). Although that proposition is dubious, particularly in light of the many respects in which the *Order* expressly provides for the affiliate to receive exclusive benefits and other more favorable treatment than any genuine competitor, a separate affiliate requirement would not in and of itself harm the competitive process if it were merely designed to make dealings with the incumbent LECs more transparent and to make it slightly easier to detect discrimination against unaffiliated competitors.

However, the Commission went further. In their proposed condition regarding the advanced services affiliate, SBC and Ameritech asked the Commission gratuitously to hold that the "advanced services affiliate" that they would create, own and control would not be an incumbent LEC subject to section 251(c). The Act defines "incumbent local exchange carrier" to include not merely local carriers existing in 1996, but also any entity that becomes a "successor or assign" of such carriers. 47 U.S.C. § 251(h)(1). While the affiliate would continue to use the same assets and employees that SBC and Ameritech used to provide advanced services, SBC-Ameritech contended that the "affiliate" would be sufficiently "separate[d]" from its local telephone business so as not be a "successor or assign." Joint Reply of SBC/Ameritech ("Joint Reply") (July 26, 1999), at 73-74 (JA 999-1000), 76 (JA 1002). SBC and Ameritech further argued that certain structural separation requirements that they were proposing would prevent SBC-Ameritech from using its control of its bottleneck local network to benefit its affiliate in preference to unaffiliated competitors. *Id.* at 71-73 (JA 997-999), 76-77 (JA 1002-1003). In addition, SBC and Ameritech repeated the claims which the Commission had previously rejected that by freeing advanced services from the market-opening requirements of

the Act, the Commission would "level [the] playing field" and spur their development. *Id.* at 73-75 (JA 999-1001).

In analyzing this proposal, the Commission recognized (¶ 454 (JA 290)) that the Supreme Court had already spoken concerning what constitutes "successorship" in the labor context. A company succeeds another where "there is substantial continuity between the enterprises," especially where the "new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43-46 (1987) (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)). Under this test, the Supreme Court has examined a number of factors, including "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs . . . ; and whether the new entity . . . produces the same products, and basically has the same body of customers." *Fall River Dyeing*, 482 U.S. at 43. The Commission purported to apply this "substantial continuity" test in analyzing the proposed merger condition. *Order* ¶¶ 454 (JA 290), 457 (JA 292).

At the same time, the Commission also determined that it had "an affirmative duty to encourage the rapid deployment of advanced services pursuant to section 706(a) of the 1996 Act." *Id.* ¶ 456 (JA 292). Thus, the Commission observed that it would seek to "balance" section 251's "purposes" with the need to ensure that such "separation requirements and safeguards" do not "burden[] . . . the deployment of innovative technologies." *Id.*

Applying this new balancing test, the Commission found that there would be "no substantial continuity between" SBC-Ameritech and its advanced services affiliate. *Order* ¶ 458 (JA 293). The Commission thus held that "a rebuttable presumption is established that

SBC/Ameritech's advanced services affiliate will not be a 'successor or assign' of an incumbent LEC . . ., and therefore not be subject to incumbent LEC regulation under section 251." *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

Although most of the conditions imposed in the *Order* establish additional obligations on SBC-Ameritech that purport to make up for the loss of local exchange competition between Ameritech and SBC and the other anticompetitive effects of the merger, the "advanced services affiliate" condition stands on an entirely different footing. This condition would *free* SBC-Ameritech from the principal mandate of the Act: to open local markets to competition. The *Order* permits SBC-Ameritech to transfer the network assets and employees that they had been using to provide advanced services to a wholly-owned affiliate that they control. That affiliate would provide the very same advanced services that SBC and Ameritech each provided prior to the merger and to the very same customers, but the affiliate's network assets and services would not be subject to section 251(c). Thus, while the *Order* purports to have extracted "conditions" from SBC-Ameritech, it has instead – at least in this portion of the *Order* – simply thrown them into the proverbial briar patch. Whatever the value generally of establishing a separate affiliate for advanced services, the Commission's distinct and independent holding that this affiliate will be relieved of the statutory market-opening requirements cannot remotely be justified as lawful, or as a "condition" that could convert an otherwise anticompetitive merger into a pro-competitive one.

The relationship the *Order* describes between SBC-Ameritech and the affiliate is more than sufficient to establish the "substantial continuity" that the Commission properly treated as the central test for successorship and that the Supreme Court has held is the yardstick by which

to judge whether an entity is a successor.[2] While paying lip service to this standard, the Commission simply disregarded the fact that SBC and Ameritech would be permitted to shift, virtually wholesale, their pre-existing advanced services line of business to an affiliate that SBC-Ameritech would wholly own and control. Indeed, it is undisputed that the merger condition would not only afford the advanced services affiliate exclusive access to significant assets that allow it seamlessly to continue SBC-Ameritech's business, but also ensure that the advanced services affiliate would maintain on an ongoing basis a substantially integrated relationship with SBC-Ameritech.

Those facts should have been dispositive. Instead, however, the Commission charted a different course. The Commission found sufficient SBC-Ameritech's agreement that it would adhere to *some* of the requirements imposed by 47 U.S.C. § 272 – the provision of the Act that requires a Bell Operating Company ("BOC") to provide long distance services through an affiliate subject to certain competitive safeguards. *See Order* ¶¶ 455-57 (JA 291-292). However, the requirements of section 272 were not designed to (and do not in fact) define circumstances in which a LEC affiliate will cease being a "successor or assign." And here, the Commission required Ameritech-SBC to comply with only "section 272 lite" by excepting the affiliate from key safeguards contained in that provision.

Presumably recognizing that requiring such "separation" could not provide sufficient justification for the *Order*, the Commission ultimately founded its decision on the argument that the successorship inquiry, when applied to an affiliate offering advanced services (but apparently not when applied to other types of affiliates), should "balance" section 251's "purposes" with the

---

[2] *See Fall River Dyeing*, 482 U.S. at 43; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964).

need to speed "the deployment of innovative technologies." *Order* ¶ 456 (JA 292). But nothing in section 251(c) or elsewhere in the Act permits such balancing. Rather, as the Commission itself has repeatedly recognized, the obligations of section 251(c) are absolute and fully apply to advanced services to the same degree as other incumbent LEC services. To the extent the Commission is correct that a "separate advanced services affiliate" might make it easier to detect incumbent LEC discrimination and would thereby spur the deployment of advanced services, the Commission could simply have required SBC-Ameritech to create an advanced services affiliate while recognizing that it would be subject to section 251(c). What the Commission was not free to do, however, is to promote the deployment of advanced services by excepting SBC-Ameritech from the express requirements of the Act.

ARGUMENT

THE AFFILIATE DESCRIBED BY THE *ORDER* IS A "SUCCESSOR OR ASSIGN" OF THE INCUMBENT LEC

"[A]n evidentiary presumption is only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it." *National Mining Assoc. v. Department of Interior*, 177 F.3d 1, 6 (D.C. Cir. 1999) (quotations omitted). Thus, this Court has repeatedly struck down presumptions where "there is an alternate explanation for the evidence that is also reasonably likely." *Id.*; *National Mining Assoc. v. Babbitt*, 172 F.3d 906, 910 (D. C. Cir. 1999). As explained below, the *only* rational inference that can be drawn from the "proved facts" – *i.e.*, the conduct that is permitted by the advanced services affiliate condition – is that there will be a "substantial continuity" between the advanced services affiliate and SBC-Ameritech and therefore that the affiliate is a "successor or assign" of SBC-Ameritech.

1. It is plain that if SBC-Ameritech and the affiliate were to "conduct their operations by engaging in all of the activities permitted in the conditions," *Order* ¶ 459 (JA 294), then the affiliate would be a "successor or assign" of SBC-Ameritech under the well-established criteria used to evaluate successorship. Indeed, this is not even a close case because successorship questions ordinarily arise either when one company takes over another that has gone out of business or as a result of an arm's length sale of assets. *See, e.g., Fall River Dyeing*, 482 U.S. at 30-31; *Burns*, 406 U.S. at 274-76; *see also Order* ¶ 453 (JA 290). Here, by contrast, SBC-Ameritech would wholly own and control the affiliate. Beyond this, the two standard indicia of successorship are present.

First, pursuant to the merger condition, the affiliate would "continue[], without interruption or substantial change," SBC's previous advanced services operations. *Fall River Dyeing*, 482 U.S. at 43. The merger condition contemplates that the affiliate would provide the same advanced services that SBC-Ameritech did, to the same customers, using the same well-established incumbent LEC brand. *See Order*, App. C, ¶¶ 3-6 (JA 364-381). The merger condition also provides for a "transitional period" (that in fact will last for at least six to twelve months) so that the affiliate can take over the previously integrated advanced services business in an "orderly" manner. *Order* ¶ 475 (JA 301). And SBC-Ameritech contended that the condition, particularly the provisions that would allow its incumbent LECs to continue to provide certain services on behalf of the affiliate, was crafted so that it would not be necessary for "the separate subsidiary . . . to be formed from the ground up." Joint Reply at 78 (JA 1004). Thus, the merger condition is designed so that the affiliate can continue SBC-Ameritech's existing advanced services line of business and provide those services to the public without any significant changes.

Indeed, SBC-Ameritech's own actions vividly illustrate this fact. After closing the merger, SBC-Ameritech in fact created the advanced services affiliate contemplated by the condition, called SBC Advanced Solutions, Inc ("SBC-ASI"). Not only has SBC-ASI continued to provide the same services that SBC-Ameritech used to provide, SBC-ASI effectively holds itself out to the public as SBC. For example, other than a "disclaimer" footnote that digital subscriber line ("DSL") service is provided by "SBC Advanced Solutions, Inc.," SBC advertisements urge consumers to buy DSL from "Pacific Bell/Southwestern Bell/Nevada Bell/Ameritech/SNET" because the DSL service is "backed up by years of experience and reliability. . . . [W]e're able to deliver to you high-speed DSL Internet access from a name you know and trust."[3] Thus, as contemplated by the merger condition, SBC-ASI is continuing to promote DSL service without *any* (let alone "substantial") change from SBC-Ameritech's prior operations, and is in fact trumpeting to consumers SBC-Ameritech's advantages as an incumbent – a quintessential case for finding successorship.

Second, the merger condition permits the affiliate to "acquire substantial assets" of SBC-Ameritech, including "Advanced Services equipment," "software, customer accounts, initial capital contribution," "real estate," "trademarks" and "service marks," and, perhaps most significantly, SBC's employees. *See Order*, App. C, ¶¶ 3 (JA 364) & n.5 (JA 365), 3c(3) (JA 367), 3d-g (JA 367-368). *See also id.* ¶ 463 (JA 296)(the condition permits the "transfer of certain advanced services equipment to the affiliate" and the transfer of "other types of assets . . . including customer accounts, initial capital contribution, and real estate, as well as employees"). All of these transfers demonstrate the "substantial continuity" that makes the affiliate a successor to SBC-Ameritech. For example, the affiliate is permitted to acquire SBC-Ameritech's customer

[3] A copy of this web site advertisement is attached hereto.

accounts, and therefore "basically has the same body of customers." *Fall River Dyeing*, 482 U.S. at 43. As for employees and equipment, the merger condition provides for "an orderly and efficient transfer of personnel and systems" from SBC-Ameritech to the affiliate by allowing a "Grace Period" during which SBC may transfer "on an exclusive basis" any "Advanced Services equipment, including supporting facilities and personnel." *Order*, App. C, ¶¶ 3c(3) (JA 367), 3e (JA 368).

The explicit purposes of such equipment and personnel transfers – "to prevent [the affiliate] from having to duplicate investments that have already been made by the SBC/Ameritech incumbent" and to allow it to provide service "more quickly," *id.* ¶ 464 (JA 297) – demonstrate the substantial and unique benefits the affiliate derived from SBC-Ameritech's incumbency. *See Fall River Dyeing*, 482 U.S. at 43-46; *NLRB v. Burns*, 406 U.S. 272, 280-81 (1972) (finding successorship obligations where new company hired a majority of predecessor's former employees).[4] Indeed, competing advanced services affiliates cannot buy equivalent equipment on the market because they must "collocate" any equipment they buy in SBC-Ameritech's central offices (assuming space is available) to provide service – a process that can take many months and tortured negotiations. *See* Comments of AT&T Corp. (July 19, 1999), at 69 (JA 884). By contrast, the *Order* permits SBC-Ameritech affiliate to obtain equipment that is already installed and tested. *Id.* In short, the merger condition provides the SBC-Ameritech affiliate with the classic markings of a successor: a wholesale transfer of assets that allows it to carry on its predecessor's business seamlessly and with all the advantages of the incumbent.

---

[4] Because the affiliate's employees may be "located within the same buildings" and even on "the same floors" as SBC-Ameritech employees, *Order*, App. C, ¶ 3g (JA 368), many employees of the affiliate are likely remain in the same offices as when they were SBC or Ameritech employees. *Cf. Fall River Dyeing*, 482 U.S. at 44 ("of particular significance" to successorship inquiry was "the fact that, from the perspective of the employees, their jobs did not change").

The Commission's only response to these undisputed facts was to claim that they were irrelevant because SBC-Ameritech would "not be transferring . . . assets that are necessary to continue the incumbent's traditional business operations." *Order* ¶ 463 (JA 296). *See also id.* ¶ 464 (JA 297)("In our context, however, we must assess circumstances under which an incumbent LEC may develop a new line of business in a new, less regulated entity . . . *while continuing other core lines of business in the incumbent LEC.*") (emphasis added). But that simply means that the affiliate might not be a successor to SBC-Ameritech's local telephone business. It is irrelevant to whether the affiliate is a successor to the *advanced services business.* Indeed, the Commission has repeatedly held that the Act is "technology neutral" and section 251(c)'s obligations apply regardless of whether an incumbent LEC is providing "basic" or "advanced" services. *Section 706 Order* ¶¶ 32-61; *Section 706 Remand Order* ¶¶ 8-12.

In all events, it is well-established that under the "partial successor" doctrine a purchaser of only a distinct aspect of a business can be a successor as to the aspect of the business it acquires. *See NLRB v. New Madrid Manuf. Co.*, 215 F.2d 908, 911, 915 (8th Cir. 1954) (upholding NLRB finding that purchaser of only small part of overall business was "partial successor"); *Hydrolines, Inc.*, 305 NLRB 416, 421-23 (1991) (explaining doctrine and citing cases). *See generally* C. Hexter, J. Neighbours & J. Higgins, *The Developing Labor Law* 364-66 (Supp. 1999) (citing and discussing cases). If the law were otherwise, it would lead to a patently absurd result. A business that provided three distinct services could transfer the assets and employees necessary to provide each service to three separate entities and none would be a "successor" because none would have purchased the "core" part of the original company's business.

2. The *Order* concedes that the affiliate would continue SBC-Ameritech's previous advanced services operation and that the merger condition contemplates the transfer of all the assets, equipment, service and trade marks, and advanced services employees to the affiliate. But the Commission nonetheless approved the presumption against successorship principally based on its view that SBC-Ameritech and the affiliate would be "separate" because SBC-Ameritech agreed that it would adhere to *some* of the requirements imposed by section 272 – the provision of the Act that requires a BOC to provide, *inter alia*, long distance services through a separate affiliate. *Order* ¶¶ 455-57 (JA 291-293). But that conclusion is untenable, for four independent reasons.

First, SBC-Ameritech would continue to wholly own and control the affiliate. As the Commission and courts have repeatedly recognized, the non-economic "separation" created here does not reduce a parent's incentive to discriminate in favor of an affiliate because its ownership interest in the affiliate permits it to reap the benefits of the affiliate's success. *See, e.g.*, Final Decision, *Second Computer Inquiry*, 77 FCC.2d 384, ¶¶ 201-05 (1980) (separate subsidiary "does not significantly change the incentives of a firm upon which it is imposed," but "reduces the ability of dominant firms to engage in predation or to do so without detection"); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) ("A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate consciousnessess, but one."). The "separation" imposed by the Commission therefore does nothing to change the fundamental fact that SBC-Ameritech would have an incentive to use its bottleneck facilities to

discriminate in favor of its affiliate and against its affiliate's competitors.[5] Thus, this type of "separation" does nothing to further the anti-discrimination goals that the Commission itself has recognized must inform the successorship inquiry here. *Order* ¶ 452 (JA 290).

Second, the Commission's "guide[]" for the how SBC-Ameritech can interact with its affiliate – section 272 – is by its own terms not intended to serve as a mechanism to ensure that incumbent LECs cannot use their bottleneck facilities to discriminate in favor of affiliates. Section 272 applies only *after* a BOC has demonstrated that it has fully implemented the obligations of section 251(c) and demonstrated to the Commission pursuant to section 271 that its markets are open to competition. It establishes requirements that seek to protect against the abuse of any residual market power the BOC may possess at that advanced stage of the market-opening process. If Congress believed that section 272 by itself were sufficient to check anticompetitive practices by incumbent LECs, it would have simply permitted BOCs to enter the long distance market without first satisfying the market opening conditions of section 251 so long as they provided long distance services through section 272 affiliates.

Third, the condition is much less stringent even than what is required by section 272. As the Commission itself concedes, the condition contains numerous exceptions to section 272 and its separation requirements. *See Order* ¶¶ 462-76 (JA 295-302). These include the affiliate's exclusive rights to SBC-Ameritech's customer care functions, exclusive sharing of SBC-Ameritech's real estate and office space, use of SBC-Ameritech's operation, installation and maintenance ("OI&M") services, temporary exclusive use of SBC-Ameritech's network planning, engineering, design and assignment services, SBC-Ameritech's exclusive services for

[5] Indeed, courts have routinely found successorship even where the two companies were in no way affiliated, and thus unquestionably separate. *See Fall River Dyeing*, 482 U.S. at 32, 44-45; *Burns*, 406 U.S. at 274.

one year in handling service complaints by the affiliate's customers, and exclusive temporary line sharing with SBC-Ameritech. *Order* ¶ 460 (JA 294). The condition omitted many others section 272 safeguards as well, such as by waiving section 272(b)(5)'s transaction disclosure requirement and a more limited "sunset" provision than section 272(f). *Order*, App. C ¶ 3(i) (JA 368).

So riddled with exceptions, the "safeguards" adopted by the Commission would provide no meaningful check on SBC-Ameritech's ability to act on its incentives to favor its affiliate. A discussion of just a handful of the section 272 loopholes endorsed by the *Order* vividly confirms this point.

OI&M. The Commission had previously determined that the requirement in section 272 that a BOC "operate[] independently" of its affiliates required that they *not* "perform operating, installation, and maintenance functions" for each other's facilities. First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 157 (1996). That was because "allowing the same individuals to perform such core [OI&M] functions on the facilities of both entities would create substantial opportunities for improper cost allocation . . . [and] would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors." *Id.* ¶ 163 (emphasis added). Nevertheless, the merger condition permits SBC-Ameritech itself to perform OI&M for the affiliate. *Order*, App. C, ¶ 3 (JA 364).

Nondiscrimination. While section 272(c) unconditionally prohibits discrimination "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards," the *Order* would permit SBC-Ameritech to discriminate in favor of its affiliate in

several ways. The merger condition contains numerous exceptions that would permit SBC-Ameritech to discriminate in favor of its affiliate for six months in the transfer of advanced services equipment, facilities, and personnel; in the use of names and trademarks; and for a full year in the provision of certain maintenance and repair reports and services. *See Order*, App. C, ¶¶ 3.e, 3.f, 3.h (JA 368).

Transaction disclosure. In addition, the *Order* expressly waives the transaction disclosure requirements of section 272(b)(5). *See Order*, App. C, ¶ 3(i) (JA 368). Instead of demanding disclosure of each transaction between SBC-Ameritech and its advanced services affiliate, the merger condition would permit SBC-Ameritech merely to disclose the terms of an interconnection agreement that it "negotiates" with its wholly-owned affiliate. Because, as noted, the affiliate and SBC-Ameritech have a complete unity of interests, no interconnection agreement between them can possibly be the product of true arm's length negotiation, nor does the affiliate have any incentive or duty to maximize its own profitability or efficiency.[6] Moreover, the affiliate (unlike its competitors) will have no reason to seek to specify precisely the terms on which it will receive goods or services from SBC-Ameritech.[7]

Joint marketing. The scope of the so-called "joint marketing" permitted by the *Order* (App. C, ¶ 3.a (JA 365)) is broader than that permitted by section 272(g) because the condition

---

[6] "In the parent and wholly-owned subsidiary context . . . the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and the parent's shareholders." D. Block, N. Barton, & S. Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors* 185 (4th ed. 1994) (citations omitted).

[7] Although Paragraph 5.a of the merger conditions states that the interconnection agreement between a BOC and its affiliate "shall be sufficiently detailed to permit telecommunications carriers to exercise effectively their 'pick-and-choose' rights under 47 U.S.C. § 252(i)," nothing in the conditions specifies the level of detail that will be required, and it is unclear how this largely hortatory provision could be enforced.

permits the BOC and its affiliate to share, on an exclusive basis, "customer care" functions, including functions that occur after a sale is made. But no reasonable construction of the term "marketing" includes post-sale activities. Dictionary definitions of "marketing" limit the term to "activity involved in the moving of goods from the producer to the consumer," and do not refer to activities that occur after goods reach a purchaser's hands.[8]

Finally, even if the Commission had managed to craft safeguards sufficient to ensure that the SBC-Ameritech could not discriminate in favor of the affiliate, that by itself would not have rendered the affiliate a non-successor of SBC-Ameritech. The two issues are distinct. Indeed, as the Commission observed, in most instances in which successorship is found, the analysis "is triggered [only] after an entity ceases to exist." *Order* ¶ 453 (JA 290). Thus, successorship is often found even when there is no possibility of discrimination.

3. Nor can the Commission defend its interpretation of "successor or assign" on the ground that it has "an affirmative duty to encourage the rapid deployment of advanced services pursuant to section 706(a) of the 1996 Act." *Order* ¶ 456 (JA 292). More specifically, in the *Order*, the Commission observed that while its interpretation of "successor or assign" should be informed by the Act's express purpose "to prevent an incumbent from leveraging market power in an anticompetitive manner," the Commission's "duty" to promote deployment of advanced services" should also inform "our analysis of the degree of separation between the SBC/Ameritech incumbent and its advanced services affiliate." *Id.* ¶ 456 (JA 292). Thus, in construing the meaning of "successor or assign," the Commission found that it was necessary to "balance" section 251's "purposes" in opening local markets to competition with the need to speed "the deployment of innovative technologies." *Order* ¶ 456 (JA 292). *See also id.* ¶ 463

[8] Webster's New World Dictionary (1984).

(JA 296)(approving transfer of substantial SBC-Ameritech assets to affiliate on the ground that "such transfers will further . . . section 706(a) of the 1996 Act in particular[] by facilitating a more efficient and competitive deployment of advanced services to consumers").

The Act, however, permits no such balancing. The construction of "successor or assign" cannot vary depending on whether the affiliate is providing advanced services rather than other services previously provided by the incumbent LEC. As the Commission has recognized elsewhere, "section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulatory methods" than those established by the other provisions of the Act. *Section 706 Order* ¶ 69. Rather, section 706(a) principally directs the Commission to use the authority granted to it by those other provisions, including its "forbearance authority" under section 10(a) of the Act, 47 U.S.C. § 160(a), "to encourage the deployment of advanced services." *Id.*

But in section 10(d) of the Act, Congress expressly forbade the Commission from forbearing from applying section 251(c) until the requirements of that subsection have been "fully implemented." *See* 47 U.S.C. § 160(d). It did so because "the requirements in sections 251(c) and 271 to open[] local markets to competition . . . [are the] cornerstones of the framework Congress established in the 1996 Act." *Section 706 Order* ¶ 76 (1998). Indeed, the *Order* itself recognizes precisely this fact:

> One of the fundamental goals of the Act is to promote innovation and investment in the telecommunications marketplace by all participants, both incumbents and new entrants, and to stimulate competition for all services, including advanced services. . . . . In particular, section 251 requires all incumbent LECs to provide nondiscriminatory access to their network facilities, thereby allowing competing carriers to enter local markets by purchasing parts of the incumbent's network, and to allow resale of their services at wholesale rates. Section 251 also facilitates investment and deployment of innovative technologies by encouraging new carriers to enter markets previously foreclosed to them with a wide array of diverse services.

Order ¶ 452 (JA 290).

Nor is it open to the Commission to contend that an incumbent LEC, when providing advanced services, is acting any less as an "incumbent LEC." Indeed, the Commission held precisely the opposite in its recent *Section 706 Remand Order*. There, US WEST argued that section 251(c) is not "triggered when a carrier provides access to network elements used solely for the provision of advanced services" because the carrier "is not acting as an incumbent LEC." *Section 706 Remand Order* ¶ 9. The Commission, however, squarely rejected this assertion and observed that no

> party ha[d] explained how exempting . . . advanced services from section 251(c) would further the purposes of this section or the 1996 Act. We find no evidence that Congress intended to eliminate the Commission's authority to require access to network elements used to provide advanced services – a result that is at odds with the technology neutral goals of the Act and with Congress' aim to encourage competition in all telecommunications markets.

Id. ¶ 12.

Thus, the other BOCs that are not subject to the *Order* continue to have section 251(c) obligations for their advanced services and underlying facilities. The separate affiliate "condition" is therefore no condition at all, but simply gives SBC-Ameritech special treatment by freeing it from the requirements of section 251(c).

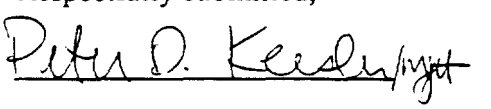
In sum, the affiliate that would be created by the merger condition is a "successor or assign" to SBC-Ameritech – and therefore an incumbent LEC – subject to the duties of section 251(c). The Commission was not free to adopt a definition of "successor and assign" that "balances" the "purposes" of section 251(c) against those of section 706(a). Instead, the Commission was obligated to adopt an interpretation of "successor or assign" that fully advances section 251(c)'s purpose of opening local markets to competition by giving competitors

nondiscriminatory access to incumbent LEC monopoly networks. And given the purposes of section 251(c), no reasonable interpretation of "successor or assign" could possibly exclude a wholly-owned – and significantly integrated – subsidiary of an incumbent LEC that continues to provide pre-existing telecommunications services using facilities, employees and other assets previously owned by and transferred from the incumbent. To the extent the Commission views the separate affiliate condition as advancing the purposes of the 1996 Act by making it easier to detect incumbent LEC discrimination in the provisioning of advanced services, the statutory answer is simple: establish a separate affiliate but recognize that it is subject to section 251(c).

CONCLUSION

For the reasons stated above, the *Order* should be reversed insofar as it holds that the SBC-Ameritech affiliate will presumptively not be a "successor or assign" of SBC-Ameritech.

Respectfully submitted,

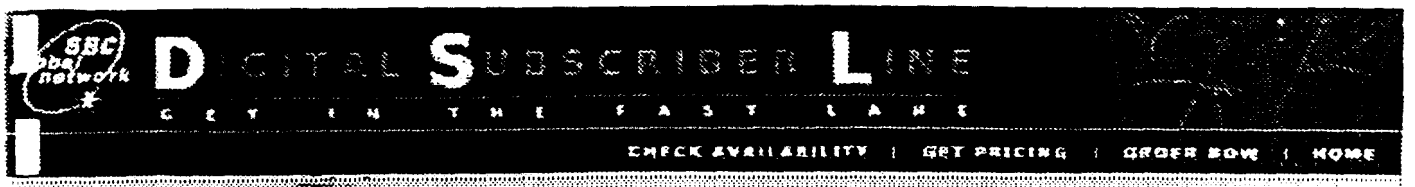


Mark C. Rosenblum
Roy E. Hoffinger
James H. Bolin, Jr.
295 North Maple Avenue
Basking Ridge, NJ 07920

Peter D. Keisler
Michael J. Hunseder
C. Frederick Beckner III
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006

Counsel for Intervenor AT&T Corp.

May 23, 2000



WHAT IS DSL INTERNET
DSL VS CABLE MODEM
SPEED
EQUIPMENT
FAQS
GLOSSARY
CONTACT US

WHY BUY DSL INTERNET?

DSL technology allows you to surf the Internet and download files to your computer with amazing speed. You'll be able to play network games with relative ease. And streaming audio and video are becoming popular applications for DSL Internet service.

Unlike the dial-up connections required for analog modems, your DSL connection is always on. That means no more logging on and off, no more busy signals and no more waiting for the connection to happen - it's always there. If you do turn your PC off (or terminate your DSL connection), it's quick and easy to log back on - no more long waits as your analog modem establishes its connection.

Another benefit is that DSL uses your existing telephone line - you can actually talk on your phone line at the same time you're using it to surf the Internet! (Not yet available in the Ameritech region.)

Why should I buy DSL from Pacific Bell, Southwestern Bell, Nevada Bell, Ameritech, SNET?

When you buy DSL from Pacific Bell/Southwestern Bell/Nevada Bell/Ameritech/SNET, it's backed up by years of experience and reliability. Our salespeople and technicians have years of experience in selling and servicing voice, data, and other telecommunications products. So we're able to deliver to you high-speed DSL Internet access from a name you know and trust.

To show our commitment to DSL, we're spending over $6 billion to build-out our high-speed DSL network and make it more available to customers throughout our region.

DSL transport service is provided by SBC Advanced Solutions, Inc. (SBC-ASI)

Southwestern Bell PACIFIC BELL NEVADA BELL ameritech SNET

TEXT ONLY | FEEDBACK]